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Jennifer Piorko Mitchell
Office of the Corporate Secretary FINRA
1700 K Street, NW
Washington, DC 20006

Re: RN 26–06 (March 2, 2026) — FINRA Requests Comment on Modernizing FINRA Arbitration Rules, Guidance and Processes

Dear Ms. Mitchell:

Thank you for the opportunity to comment on FINRA's arbitration rules.

I write as one who formerly served on the Securities and Exchange Commission's enforcement division staff, a former advocate for investors in NASD/FINRA securities arbitrations, and an NASD/FINRA arbitrator, who has chaired about two dozen cases to award.

My comments relate to FINRA Code of Arbitration Procedure rule 12512, Subpoenas. The rule is outdated and should be revised to conform with federal law.

The Federal Arbitration Act ("FAA") governs almost all FINRA arbitrations. Section 2 of the FAA provides in relevant part: "a contract evidencing a transaction involving commerce to settle by arbitration a controversy shall be valid, irrevocable, and enforceable … ." 9 U.S.C. § 2 (2024)[1]. The Supreme Court has found that "the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce'– words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003); *see Chartis Seguros Mex., S.A. v. HLI Rail & Rigging, LLC*, 967 F. Supp. 2d 756, 763 (S.D.N.Y. 2013) ("In *Alafabco*, the Supreme

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[1] Section 2 provides in its entirety:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.

Court held that debt–restructuring agreements were executed in Alabama by Alabama residents were nonetheless contracts evidencing transactions 'involving commerce,' whose arbitration clauses were subject to the FAA, for three reasons. First, one of the parties to the agreement with the arbitration engaged in business throughout the southeastern United States using loans renegotiated and redocumented in debt–restructuring agreements. Second, the restructured debt was secured by inventory assembled from out–of–state parts and raw materials. Third, the court recognized the broad impact of commercial lending on the national economy.") (internal citations omitted).

The cases heard at FINRA concern matters "involving commerce." Therefore, the FAA governs FINRA arbitrations.

FAA section 7[2] provides in relevant part: a subpoena "shall issue in the name of the arbitrator or arbitrators, or a majority of them, and **shall be signed by the arbitrators, or a majority of them**, … ." 9 U.S.C. § 7 (2024) (emphasis added). Thus, in an arbitration governed by the FAA, a majority of the arbitrators on the panel must sign a subpoena.

Inconsistent with federal law is FINRA's subpoena practice. Code of Arbitration Procedure rule 12512(a)(1) provides: "Arbitrators shall have the authority to issue subpoenas for the production of documents or the appearance of witnesses." FINRA interprets this provision to mean one arbitrator has the authority to issue subpoenas. Thus, rule 12512(d) begins "If the arbitrator issues a subpoena … ." Even Regulatory Notice 26–6, which is the request for comments to which this

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[2] Section 7 provides in its entirety:

> The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

comment responds, says on page 24, "In addition, the chairperson is authorized to act on behalf of the panel in issuing subpoenas, … to expedite the process and permit any party to develop its case fully." This practice contradicts the FAA, and FINRA should end it.

I suggest rule 12512 be amended as follows: "**A majority of the arbitration panel** shall have the authority to issue subpoenas for the production of documents or the appearance of witnesses." The remainder of the rule and FINRA advice should be changed accordingly.

In addition, the rule allows arbitrators to issue subpoenas to third parties to obtain discovery. In many jurisdictions this is deemed to violate the FAA.

Ever since Judge Samuel Alito wrote for the Third Circuit in *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3d Cir. 2004) "Section 7's language unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time[,]" (footnote omitted) no federal court of appeals has interpreted the FAA to allow arbitrators to issue to third parties discovery subpoenas. *See Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145 (11th Cir. 2019); *CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703 (9th Cir. 2017); *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210 (2d Cir. 2008); *see also COMSAT Corp. v. NSF*, 190 F.3d 269 (4th Cir. 1999) (pre *Hay Group*); *contra Sec. Life Ins. Co. v. Duncanson & Holt*, (8th Cir. 2000) (pre *Hay Group*).

This becomes an issue when I serve as chair of an arbitration panel, and a party asks me to issue to third parties discovery subpoenas. I hear cases in the Second Circuit, which interprets the FAA to limit arbitrators to issuing to third parties hearing subpoenas – not discovery subpoenas. Invariably, I am met with the complaint "But FINRA rules allow for discovery subpoenas." I have to explain that the Second Circuit does not allow it, and, of course, " FINRA's internal rules do not supersede the FAA. *Schnall v. ProShares Trust*, 09 Civ. 6935 (JGK), 10 Civ. 3042 (JGK), 2010 U.S. Dist. LEXIS 127208, at *5 (S.D.N.Y. Dec. 1, 2010) ("FINRA's internal rules cannot expand this power against parties who have not consented to the FINRA arbitration proceeding at issue.") (quashing a third–party discovery subpoena issued by a FINRA arbitrator).

It would reduce the confusion surrounding this issue if rule 12512(a)(1) were further revised to provide: "**A majority of the arbitration panel** shall have the authority to issue subpoenas for the production of documents or the appearance of witnesses **as allowed by law**."

Also, Rule 12512 needs to be revised to account for the stringent service requirements provided by the FAA. Rule 12512(d) provides in relevant part "The party must serve the subpoena on the non–party by overnight mail service, overnight delivery service, hand delivery, email or facsimile."[3] FAA section 7 provides: subpoenas "shall be served in the same manner as

[3] Rule 12512(d) provides: "If the arbitrator issues a subpoena, the party that requested the subpoena must serve the subpoena on all parties and, if applicable, on any non-

subpoenas to appear and testify before the court … .” Federal Rule of Civil Procedure 45[4] governs such subpoenas. It requires, among other things, a certain form of service, as well as attendance and mileage fees. FINRA’s rule ignores these requirements.

The majority rule is that service of a subpoena on a third party must be by personal service. 9 Moore’s Federal Practice – Civil § 45.21 (2026) (citing the 2nd, 3rd, 4th, & 5th Circuit Courts of Appeals as well as cases from the 6th, 10th, 11th, & D.C. Circuits). Even so, many of the same courts recognize that other forms of service may be appropriate in the appropriate cases (*Id.*) (citing cases in the 2nd, 4th, 6th , 7th, 8th & 11th Circuits.)

FINRA’s rule falls short. The FAA may not allow the form of service FINRA allows, and the rule says nothing about the fees that must be tendered at the time of service.

By ignoring the stringent FAA and Rule 45 requirements and by creating its own set of rules, FINRA may sometimes assist the parties in getting documents from a third party (in violation of federal law), but it will almost always come at a price to parties, arbitrators, and even FINRA itself. It will expose them to a possible charge of abuse of process.

While FINRA may think Rule 12512 carefully defines the contours of discovery subpoenas, it has actually created a variety of traps for the unwary.

FINRA should conform its rules to the law.

Thank you again for the opportunity to comment.

Very truly, yours

/s/ *Martin L. Feinberg*

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party receiving the subpoena. The party must serve the subpoena on the non-party by overnight mail service, overnight delivery service, hand delivery, email or facsimile.”

[4] Rule 45(b)(1) provides:

> Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person’s attendance, tendering the fees for 1 day’s attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.